No. 22,128

United States
COURT OF APPEALS
for the Ninth Circuit

MELVIN JACK TURNER, Bankrupt,

Appellant,

v.

JULIA L. BOSTON, Trustee in Bankruptcy, and VALLEY CREDIT SERVICE,

Appellees.

Appeal from the United States District Court for the District of Oregon

THE HONORABLE ROBERT C. BELONI, Judge

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Bankrupt filed his voluntary Petition in Bankruptcy and received a discharge in 1958. In 1963 he filed a second Petition in Bankruptcy, but was denied a discharge because it was filed within six years of the previous petition. On November 14, 1966, and six years after his first discharge in bankruptcy, bankrupt filed the third Petition in Bankruptcy and in-

cluded in said petition the debts which had previously been scheduled in the petition filed in 1963, with said petition setting forth separately those debts previously scheduled and noting that a discharge had been denied as to them. The Referee in Bankruptcy denied a discharge of those debts which had been listed in the second petition on the ground that the denial of a discharge in 1963 was res judicata, which opinion was affirmed on appeal by the District Court.

The legal question raised by this appeal is whether a petitioner may obtain a discharge after a period of six years has elapsed from a previous discharge where an intervening petition in bankruptcy has been filed and the petitioner denied a discharge upon the sole ground that his petition was premature and within the six year limitation under Section 14 (c) (5) of the Bankruptcy Act, as to those debts on the present petition which were included in the previous petition for which a discharge was denied.

SUMMARY OF ARGUMENT

There is a sharp conflict upon the question whether the denial of a discharge upon the ground of a prior discharge within six years operates as a bar to the discharge of the same debts in a third proceeding. 9 Am. Jur. 2d, Section 687, P. 514. It is held on the one hand that the principal of res adjudicata applies to the denial of a discharge irrespective of the ground of opposition made to the discharge, and that a discharge cannot be had in a bankruptcy proceeding

from debts which were provable in a prior proceeding in which a discharge was denied on the ground of a prior discharge within six years. *Chopnick* v. *Tokatyan* (C.A. 2) 128 F.2d 521. Other courts have taken the view that the principal of res adjudicata does not apply if the denial of a discharge was on the sole ground of a prior discharge within six years. The result of this view is that the denial of a discharge on such ground does not preclude the discharge in a third proceeding from debts which were provable in the second proceeding. P*rudential Loan & Finance Co.* v. *Robarts* (C.A. 5) 52 F.2d 918; *In the Matter of Charles S. Masterson, f.d.b.a. Prune-Rite Mfg. Co.*, (U.S.D.C., N.D. California, S.D.) 240 Fed. Supp. 543; 1 Collier on Bankruptcy, 14th Edition p. 1422.

ARGUMENT

1. The court erred as a matter of law in ruling that petitioner be denied a discharge in bankruptcy as to those debts listed in a prior bankruptcy filed October 18, 1963, said prior petition having been filed within six years of a previous discharge in bankruptcy, under Section 14 (c) (5) of the Bankruptcy Act.

I submit to the court that the proposition of the denial of a discharge based upon the proposition of res adjudicata is untenable. I submit that the issue in the prior petition is not the same issue as is involved in the present petition. The only issue involved in the prior petition where the discharge was denied was whether the petition had been filed within the six year time limitation. The identical same issue is

not in question at this time. In 45 Har. L. Rev. 1110, the author states that "If a discharge had been denied because of the prior discharge in bankruptcy within six years, the issue would be res adjudicata against the bankrupt only as to the particular defense raised, and this should no longer avail due to its temporary nature."

A review of the cases will reflect that the origination of the rule as reflected in the *Chopnick* case arose from the situation where a petitioner would fail to request a discharge. The bankrupt would file a petition in bankruptcy within the six year time limitation period and then fail and neglect to request a discharge. By this means he was able to in effect have a stay enforced against his creditors as often as he wished. Then he would again file a petition in bankruptcy after the six year period had elapsed and apply for the discharge. It was upon this set of facts that the rule originated denying the discharge. This situation cannot prevail today because of the change in the law with regard to the manner of the entry of the order of discharge.

Oglesby in his volume "Some Developments in Bankruptcy Law" (1943) reported in 18 Journal of National Association of Referee's 9, 10, reports the rule as followed in the *Chopnick* case as involving "too harsh a penalty."

I believe that the thinking of our Circuit Court of Appeals on this matter is indicated in the recent case of *In re Mayorga*, 355 F.2d 89 (1966) wherein

the court states as follows: "Section 14 (c) (5) is not in pari materia with the other six items of paragraph (c). It describes no wrongful act on the part of the bankrupt. It merely prescribes the six year interval which must elapse between discharges." To the same effect is the *Roberts* case which stated as follows: "The refusal of a discharge because of a prior discharge within six years stands on a different footing from a refusal on any other grounds set forth in Title 11, USCA Section 32 (b). The other grounds all involve reprehensive conduct of the bankrupt which Congress intended to punish by a perpetual refusal to discharge him from the claims of his then creditors. The purpose in adding the ground relating to a prior discharge within six years was not to punish, but only to postpone a second discharge for that period of time. An ill-advised voluntary adjudication, or an involuntary one on acts of bankruptcy which do not also defeat discharge, had within five years of the granting of a prior discharge, and on which no discharge can possibly be granted, was not intended to result in making the provable claims of creditors bankruptcy proof forever. Such a construction would tend to defeat one of the main purposes of the act, to-wit: The relief of honest debtors to surrender their property to their creditors. This provision of the act as it stood in 1927 makes no distinction between voluntary and involuntary bankruptcies, and the construction contended for would enable creditors of an insolvent, by obtaining a judgment or attachment, or taking advantage of some

other innocent act of bankruptcy within five years from a prior discharge, to obtain the benefits of bankruptcy for themselves, without possibility of the debtor, however honest, obtaining a discharge from their claim then or at any time in the future. We conclude that a discharge denied on the sole ground that six years had not elapsed since a prior discharge is not a bar to a discharge applied for in another bankruptcy proceeding after the expiration of six years." I submit to the court that the decision of the referee in this matter denying your petitioner relief acts as a knife and not as a two edged sword. It denies your petitioner relief upon making an honest mistake, and yet at the same time leaves him open to the same result, a perpetual refusal to allow your petitioner the relief of a court of bankruptcy, upon an involuntary petition in bankruptcy. That is, the rules should operate in both a voluntary and involuntary bankruptcy petition, and if so, the rule obviously is unjust when applicable in the involuntary proceeding.

There is nothing in this proceeding, nor is there anything in the record of the former proceeding, to indicate that the early filing was anything other than an honest mistake of the petitioning bankrupt. Upon this basis then I respectfully urge the court to reverse the decision of the referee and grant to your petitioner the relief requested. Although the referee in his Order Denying Discharge of Specific Debts has indicated that a petitioning bankrupt upon discovery of the fact that he has filed prematurely may

petition the court for a dismissal of his bankruptcy petition without prejudice, I find no such relief allowed by the statutes. Such relief not being available under the statutes I do not believe that the bankrupt petitioner can be condemned for not following this avenue of relief. Also, it would appear that a creditor could object to such dismissal in which case the dismissal would not be allowed and the bankrupt would be forever precluded from obtaining a discharge as to the debt listed in his petition. I submit that the decisions which do not allow the relief requested in this petition are being unfairly harsh upon the petitioner and much too lenient in favor of the creditors.

CONCLUSION

The decision of Judge Belloni and Referee Folger Johnson Jr., should be reversed and the bankrupt granted a discharge as to those debts listed in the present petition which were previously listed in his bankruptcy petition filed October 18, 1963, upon the grounds and for the reason that the prior refusal of a discharge does not preclude the bankrupt from receiving relief herein.

Respectfully submitted,

DONALD D. MCKOWN
Attorney for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

DONALD D. MCKOWN